MATHEW VERGIS & ANOR A

v.

HSBC BANK MALAYSIA BHD

HIGH COURT MALAYA, MUAR B
LAU BEE LAN J
[SUIT NO: 22-38-2003]
10 APRIL 2010

TORT: *Defamation - Dishonour of cheques - Cheques returned unpaid with phrase "Refer to the Drawer" despite sufficient funds in drawer's account - Whether libelous - Whether capable of defamatory meaning* C

BANKING: *Cheques - Dishonoured cheque - Cheques returned unpaid with phrase "Refer to the Drawer" despite sufficient funds in drawer's account - Whether libelous - Whether capable of defamatory meaning* D

WORDS AND PHRASES: *"Refer to the Drawer" - Euphemism meaning - Whether drawer has insufficient funds in account - Cheques returned unpaid with phrase "Refer to the Drawer" despite sufficient funds in drawer's account - Whether capable of defamatory meaning - Whether giving rise to an action in tort* E

The plaintiffs were customers of the defendant bank with a current bank account. The plaintiffs issued two cheques drawn on the said account payable to third parties, *ie,* the sum of RM20,781.25 F to Bank of Commerce Bhd (later known as Bumiputra Commerce Bank Bhd) and the sum of RM10,000 to one Mathew Thomas. Those payments were for the financial and business commitments of the plaintiffs. The total sum of the cheques drawn on the said account amounted to RM30,781.25 and the plaintiffs had more G than sufficient funds in the said account in the amount of RM50,817.33 to meet the cheque payments. However, the cheques were dishonored by the defendant upon presentation and were returned unpaid with the phrase "Refer to the Drawer". The plaintiffs contended that the phrase "Refer to the Drawer" were H capable of carrying a defamatory meaning adverse to the interest of the plaintiffs under the facts and circumstances of the case. The defendant on the other hand contended that the phrase "Refer to the Drawer" was not libelous as the banks frequently used the phrase in practice and third party's estimation of the I plaintiffs should not be affected at all.

Held (allowing the plaintiffs' claim):

(1) In deciding whether the phrase "Refer to the Drawer" was capable of being libel, one must look at the context and the circumstances in which the phrase appeared. Where consideration was based on the natural and ordinary meaning then one must look at the meaning which reasonable men of ordinary intelligence with the ordinary man's general knowledge and experience of worldly affairs would be likely to understand them. That included any implication or inference which a reasonable person, guided not by special knowledge but only by general knowledge and not fettered by any strict rules of construction would draw from the words (see Gopal Sri Ram JCA as he then was in *Chok Foo Choo v. The China Press Berhad*, foll). (para 6)

(2) If the meaning "Refer to the Drawer" meant that there was no money to pay the cheque, and the statement was true, it was not libelous. The phrase "Refer to the Drawer" was an euphemism meaning that there were insufficient funds in the drawer's account and the reason the cheque was rejected. The case authorities established that the words "Refer to the Drawer" when made without good reason or cause, was capable of being defamatory. It followed therefore that in the present case, the phrase "Refer to the Drawer" was capable of carrying a defamatory meaning as the plaintiffs had sufficient funds in their account to meet the cheque payments. (paras 7, 12, 14 & 20)

Case(s) referred to:

Baker v. Australia and New Zealand Bank Limited [1958] NZLR 907 ***(refd)***

Bumiputra-Commerce Bank Berhad v. Top-A Plastics Sdn Bhd [2008] 5 CLJ 737 ***(refd)***

Charles Edward Victor v. Malayan Banking Bhd [2008] 4 CLJ 59 HC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA

Citibank Savings Limited v. Stanley Stergiou and Ekaterine Stergiou No. SC 181 of 1992 [1985] ACTSC 43 ***(refd)***

Davidson v. Barclays Bank Limited [1941] 164 LT 25 ***(refd)***

Flach v. London and South-Western Bank (Limited) [1915] xxxi TLR 334 ***(refd)***

Frost v. London Joint Stock Bank (Limited) [1906] 22 TLR 760 ***(refd)***

Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1977] 3 LNS 2 HC ***(refd)***

Hill v. National Bank of New Zealand Ltd [1985] 1 NZLR 736 ***(refd)***
Jayson v. Midland Bank Ltd [1968] 1 Lloyd's Rep. 409 ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
Lee Wah Bank Ltd v. Ng Kim Lek & Ors [1978] 1 LNS 95 FC ***(refd)***
London Joint Stock Bank Ltd v. Macmillan and Arthur [1918-19] All ER Rep 30 ***(refd)***
Plunkett and Another v. Barclays Bank Limited [1936] 1 All ER 653 ***(refd)***
Pyke v. Hibernian Bank Limited [1950] IR 195 ***(refd)***
Raafbye Corporation Pty Ltd and Ors v. Westpac Banking Corporation Ltd [1994] NSW Lexis 13456 ***(refd)***
Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors [1999] 8 CLJ 499 ***(refd)***
Sekitar Engineering Sdn Bhd v. Konsortium Bersekutu Sdn Bhd & Anor [1989] 1 CLJ 1123; [1989] 2 CLJ (Rep) 444 HC ***(refd)***
Tan Ah Sam v. Chartered Bank [1970] 1 LNS 153 FC ***(refd)***
Tan Sri Dato' Vincent Tan Chee Yioun v. Haji Hasan Hamzah & 6 Ors [1995] 1 CLJ 117 ***(refd)***
The Queen v. Chan Hong-Ling [1982] HKDC 1 ***(refd)***
Thong Ko Sine v. Wilkinson & Ors [1988] 1 HKC 56 ***(refd)***
Top-A Plastics Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd [2006] 3 CLJ 460 HC ***(refd)***
Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor [1991] 1 LNS 19 HC ***(refd)***

Other source(s) referred to:
Gatley on Libel and Slander, 10th edn, para 2.25, p 58
Gatley on Libel and Slander, First Supplement to the Seventh Edition, para. 93, p 93
Paget's Law of Banking, 12th edn, pp 337-338

For the plaintiffs - Desmond J Louis; M/s DJ Louis & Co
For the defendant - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners

Reported by Usha Thiagarajah

JUDGMENT

Lau Bee Lan J:

[1] This is an appeal by the appellant/defendant ("the defendant") against my decision wherein I had allowed the plaintiffs' claim with costs as per the statement of claim and for damages to be assessed by the learned deputy registrar. In a nutshell this is a case involving the dishonour of two (2) cheques issued by the plaintiffs with the remark "Refer to Drawer" of which the plaintiffs claimed were libellous.

1.1 Pursuant to the direction from His Lordship Jeffrey Tan Kok Wha when the matter came up for hearing on 26 April 2006 for the issue of liability in this defamation action be tried as a preliminary issue with reference to the expression "Refer to Drawer", in this proceedings on the issue of liability, the parties agreed the issues for determination (encl. 24) are:

1. Whether the words "Refer to Drawer" with reference to the cheques under the circumstances, and in view of the law and facts, were libellous and/or capable of carrying a defamatory meaning.

2. Whether the words "Refer to Drawer" were in fact defamatory of the plaintiffs.

Dated the 25th day of April 2006.

[2] From the pleadings and statement of agreed facts (on the issue of liability) the uncontroverted and agreed facts are as follows.

(a) The plaintiffs, who were customers of the defendant, operated the bank current account No. 305-060915-028 at the material time – para. 1 statement of agreed facts ('SAF') and pp. 1 to 5 Ikatan Dokumen ('ID').

(b) The plaintiffs issued two cheques drawn on the said account payable to third parties for the amounts stated therein namely, Bank of Commerce Berhad later known as Bumiputra Commerce Bank Berhad and to the said Mathew Thomas – para. 2 'SAF' and pp. 21 and 22 'ID'.

(c) Both cheques were dishonoured by the defendant upon presentation by the presenters and were returned unpaid with the remarks or advice 'Refer to Drawer' – para. 3 'SAF' and p. 7 'ID'.

(d) The plaintiffs were possessed of funds or in funds to the amount of RM50,817.33 in the account to meet payment on the said cheques drawn in favour of Bumiputra Commerce Bank Berhad formerly known as Bank of Commerce Berhad for the sum of RM20,781.25 and to one Mathew Thomas for the sum RM10,000 – paras. 2.1, 2.2 and 4 'SAF' and pp. 6 and 7 of 'ID'.

(e) The cheque payments were made to third parties which were a commercial bank and an individual, to meet certain financial or business commitments or obligations of the plaintiffs – para. 5 p. 12 of 'Ikatan Pliding' ("IP") and pp. 20, 21, 23 and 108 to 110 of ID.

(see also p. 55 ID – Legal Notice of Demand of D J Louis & Co.).

[3] The crux of the issue is the meaning that the words "Refer to Drawer" conveyed to the presenters of the said cheques on the facts and circumstances of this case. Learned counsel for the plaintiffs contended that the words 'Refer to Drawer' which were the remarks stated by the defendant upon dishonouring and returning the cheques unpaid to the plaintiffs' payees namely, Bank of Commerce Berhad later known as Bumiputra Commerce Bank Berhad and to the said Mathew Thomas, were in law, capable of carrying a defamatory meaning adverse to the interest of the plaintiffs under the facts and circumstances of this case and were in fact, defamatory of them. Several authorities, local and from other jurisdictions, including the Commonwealth were cited:

(i) *Tan Ah Sam v. Chartered Bank* [1970] 1 LNS 153

(ii) *Lee Wah Bank Ltd v. Ng Kim Lek & Ors.* [1978] 1 LNS 95

(iii) *Jayson v. Midland Bank Ltd* [1968] 1 Lloyd's Rep.409

(iv) *Flach v. London and South-Western Bank (Limited)* [1915] Vol. xxxi TLR 334

(v) *Hill v. National Bank of New Zealand Ltd.* [1985] 1 NZLR 736

(vi) *Thong Ko Sine v. Wilkinson & Ors* [1988] 1 HKC 56

(vii) *Raafbye Corporation Pty Ltd and Ors. v. Westpac Banking Corporation Ltd* [1994] NSW Lexis 13456

(viii) *Pyke v. Hibernian Bank Limited* [1950] IR 195

(ix) *Charles Edward Victor v. Malayan Banking Bhd.* [2008] 4 CLJ 59

(x) *Top-A Plastics Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd (formerly known as Bank of Commerce (M) Bhd)* [2006] 3 CLJ 460

(xi) *Bumiputra-Commerce Bank Berhad v. Top-A Plastics Sdn Bhd* [2008] 5 CLJ 737

(xii) *Hasnul Abdul Hadi v. Bulat Mohamed & Anor.* [1977] 3 LNS 2.

[4] Learned counsel for the defendant held a contrary view arguing that in the Malaysian context the words are not libellous and that a majority of the local cases supported this contention; further the two cheques even if capable of a defamatory meaning, is in fact not defamatory of the plaintiffs firstly, as banks are used to those words being used in practice and secondly, the brother's (Mathew Thomas) estimation of the plaintiff is not affected at all. Cases cited in support of his proposition are:

(i) *Flach (supra)*

(ii) *Plunkett and Another v. Barclays Bank Limited* [1936] 1 All ER 653

(iii) *Jayson (supra)*

(iv) *Pyke (supra)*

(v) *Hill (supra)*

(vi) *Citibank Savings Limited v. Stanley Stergiou and Ekaterine Stergiou No. SC 181 of 1992* [1985] ACTSC 43 (12 May 1995)

(vii) *Raafbye Corporation Pty Ltd (supra)*

(viii) *Thong Ko Sine (supra)*

(ix) *Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor* [1991] 1 LNS 19

(x) *Tan Ah Sam (supra)*

(xi) *Sekitar Engineering Sdn. Bhd. v. Konsortium Bersekutu Sdn. Bhd. & Anor.* [1989] 1 CLJ 1123; [1989] 2 CLJ (Rep) 444

(xii) *Lee Wah Bank Ltd (supra)*

(xiii) *The Queen v. Chan Hong-Ling* [1982] HKDC 1

(xiv) *Frost v. London Joint Stock Bank (Limited)* [1906] 22 TLR 760

(xv) *Baker v. Australia and New Zealand Bank Limited* [1958] NZLR 907,

(xvi) *Gatley on Libel and Slander,* 10th edn para 2.25 at p. 58.

[5] The court has considered the written cum oral submissions of both parties. The court's findings are the following.

[6] Learned counsel for the defendant submitted that one should not look at whether there was justification in deciding whether the words "Refer to Drawer" are libellous but rather at the phrase itself to see if it was capable of carrying a defamatory meaning in law. Learned counsel for the plaintiffs submitted, which I agree, that this is untenable in law as the context and circumstances in which the words appear are equally considered and where the consideration is based on the natural and ordinary meaning ie, in the meaning in which reasonable men of ordinary intelligence, with the ordinary man's general knowledge and experience of worldly affairs, would be likely to understand them, including any implication or inference which a reasonable person, guided not by any special knowledge but only by general knowledge and not fettered by any strict legal rules of construction would draw from those words. This was the approach in *Chok Foo Choo v. The China Press Berhad* [1999] 1 CLJ 461 taken by Gopal Sri Ram JCA (as he then was) following *Jones v. Skelton* [1963] 3 All ER 952 (HL) at p. 958. In *Chok Foo Choo (supra)* the plaintiff/appellant, a businessman and an MCA member sued the defendant/respondent which had published in its newspaper an article which alleged meant that the appellant was, *inter alia,* a cheat and that he was guilty of making false statements to the press with the intention of gaining popularity and/or that he was untrustworthy. The trial judge found the article not defamatory and that it was fair and dismissed the appellant's claim. The issue was whether the trial judge was correct in his approach and findings.

6.1 Likewise a similar position was adopted at para. 93 at p. 93 of *Gatley on Libel and Slander, First Supplement to the Seventh Edition;* in fact the learned author of Gatley stated the words are not to be construed in a milder sense (mitiori sensu) merely because they are capable on some forced construction of being interpreted in an innocent sense and footnote (no. 71) states "The rule [(mitiori sensu)] which at one time prevailed has been long ago superseded." and "An imputation may be defamatory whether or not it is believed by those to whom it is published …" (para. 4 of *Gatley on Libel and Slander,* 7th edn) cited in *Hasnul (supra),* a case involving a claim for damages for libel contained in the Utusan Malaysia where the defendants averred that the words used were not actionable *per se* and denied that they bore or were understood to bear or were capable of a defamatory meaning.

[7] Learned counsel for the defendant submitted that in the case of *Flach (supra),* Scrutton J at p. 336 stated:

> With regard to the question of libel, the words "refer to drawer" in his opinion, in their ordinary meaning, amounted to a statement by the bank, "We are not paying; go back to the drawer and ask why," or else, "go back to the drawer and ask him to pay." In the view he took of the case the bank were justified in not paying under the moratorium, and he did not think that it was possible to extract a libellous meaning from what had been said by the bank. Evidence had been given, however, to the effect that "refer to drawer" meant that there was no money to pay the cheque. If that was the true meaning then on the view he had taken of the moratorium proclamation the statement was true and therefore not libellous. Taking the view that the words complained of were not capable of a libellous meaning, he must enter judgment for the defendants.

7.1 Learned counsel next submitted that this ratio was followed in *Plunkett (supra)* when at p. 659 Du Parcq, J said:

> I have only to add that in the circumstances of this case the words "Refer to drawer" were, in my opinion, no libel. I respectfully adopt the language of SCRUTTON, J., as he then was, in *Flach v. London and South-Western Bank Ltd.* (7), at page 336.

7.2 Then the learned counsel submitted in the case of *Jayson (supra)*, it is a trial by jury and there was no reference to *Flach (supra)* and *Plunkett (supra)* where the jury at p. 409, *inter alia*, decided:

(B) As to libel:

(1) Was the effect of words "Refer to Drawer" upon two cheques to lower plaintiff's reputation in the minds of right-thinking people?

Answer: Yes.

[8] On the other hand learned counsel for the plaintiffs submitted that the banks were in the circumstances of *Flach (supra)* and *Plunkett (supra)* justified in dishonouring the cheques upon presentation for payment. I am in agreement with him. In *Flach (supra*), in an action by the plaintiff against the defendants for breach of contract and libel where the cheque was presented and returned with the words "Refer to drawer" upon it. It is obvious that Scrutton J himself held the view from the passage quoted at p. 336 as emboldened above that the bank was justified on the evidence adduced in not paying, under the moratorium proclamation on payments of a certain amount made by a bank or in respect of any contract made before a particular date, because the phrase meant that there was no money to pay the cheque in the circumstances. In fact as pointed out on behalf of the plaintiffs, the learned author in *Gatley on Libel and Slander*, 10th edn at para. 2.25 at p. 58 criticized Scrutton J's opinion commenting "It is true that such an expression does not necessarily imply anything defamatory of the drawer, **but this is too severe a test and the weight of the case law indicates that it is capable of being defamatory**." (emphasis added).

8.1 As submitted on behalf of the plaintiffs, which I agree, in *Plunkett (supra)*, no libellous meaning was ascribed to the word 'Refer to drawer" because the garnishee order nisi against a solicitors client account gave the defendant bank justification to refuse payment with the said words on a cheque issued by the plaintiff (solicitor) and presented on this account by a payee of the plaintiff. Thus this accounts for why the learned judge used the phrase "in the circumstances of this case" (see para. 7.1 above).

A 8.2 As for the case of *Jayson (supra)*, I agree with the plaintiffs nothing turns on defendant's contention that the question of whether the words "Refer to drawer" was in fact defamatory or otherwise was decided by a jury as in England, libel actions are tried by judge and jury, thus it is well within the province
B of the jury to decide the question of fact at first instance whilst in Malaysia the question of fact and law is decided by the trial judge sitting alone (See *Chok Foo Choo (supra)* at p. 758). Thus in *Jayson (supra)*, the question was the effect of words "Refer to drawer" upon two cheques dishonoured
C by the defendant bank to lower the plaintiff's (claimed damages for alleged breach of contract and for libel) reputation in the minds of right thinking people was answered in the affirmative. I am in agreement with the learned counsel for the plaintiffs that it is immaterial that *Flach (supra)* and *Plunkett*
D *(supra)* were not referred to in *Jayson (supra)* because both the former cases did not set any principle of law that the words "Refer to drawer" in the context of a dishonoured cheque did, on its own carry an innocent meaning such that one would not have to refer to the facts and circumstances
E of each case to ascertain whether justification afforded a defence to the bank.

[9] In *Pyke*'s case *(supra)*, the plaintiff had a current account with the defendant bank; plaintiff issued three cheques which
F when presented for payment were dishonoured, one marked "refer to drawer – present again" and two marked "refer to drawer"; at the time of presentation for payment, the plaintiff's account was overdrawn but was secured by some form of collateral as security for an overdraft. In an action for breach of contract and libel, at
G first instance it was held that the expression "refer to drawer" was defamatory and constituted libel but on appeal, a four man panel of the Supreme Court of Justice were evenly divided over the issue of whether the expression was capable of a defamatory meaning where *Flach (supra)* and *Plunkett (supra)* were considered.

H **[10]** In *Hill v. National Bank of New Zealand Ltd* [1985] NZLR 736, the plaintiff who carried on a business partnership had three overdraft accounts with the defendant bank which dishonoured and marked four cheques drawn on from two separate accounts with "R/D" meaning "Refer to drawer". The plaintiff sued on
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breach of contract and defamation. On the latter cause of action, the learned High Court judge after reviewing *Flach (supra), Plunkett (supra), Jayson (supra), Pyke (supra)* and *Baker v. Australia* and *New Zealand Bank Limited* [1958] NZLR 907, at pp. 749-750 had some reservations whether in the absence of evidence on "today's banking conditions since all regular users of cheque accounts must be conscious of the large volume of cheques and the variety of types of accounts" to draw instantly an imputation (whether the words were in fact defamatory) adverse to the plaintiff from the publication. However, it is observed that the learned judge found the publication to be defamatory as immediately thereafter said "However, notwithstanding these reservations, I have concluded that dishonour of a cheque remains a serious matter and that the majority of reasonable people would think that in all probability the bank had done so on good grounds founded on some circumstance discreditable to the drawer of the cheque ...". In the light of this observation, with due respect to the learned defendant counsel I find I cannot agree that the decision in *Hill (supra)* is not conclusive.

[11] In *Citibank Savings Limited (supra)* learned counsel for the defendant submitted that the case of *Plunkett (supra)* was referred but in *Raafbye Corporation Pty Ltd (supra)* the learned judge held the words "Refer to drawer" are capable of conveying the imputation that the plaintiff is insolvent in the sense of being unable to pay his/its debt.

11.1 As submitted by the learned counsel for the plaintiffs I agree that the case of *Citibank Savings Limited (supra)* is not relevant as at para. 109 at p. 14 of the report after referring to the common law position on dishonour of cheques amongst which the case of *Plunkett (supra)* was cited, at para. 110 at p. 14 of the report, the learned judge said "However, the cause of action pleaded by the defendants was not breach of contract. It was alleged that the dishonour of the cheques was "conduct" that was "unconscionable", contrary to s. 51AA and/or s. 51AB of the TP (Trade Practices) Act [1974]".

11.2 Having established that *Citibank Savings Limited (supra)* is not relevant, I find there is no contradiction in the Australian approach as it is not disputed by the parties to this instant case, in the case of *Raafbye Corporation Pty Ltd*

(supra), the learned judge held at p. 11 that the expression "refer to drawer" was capable of conveying a defamatory meaning in that the drawer of the cheques was insolvent. Summarily the facts were the plaintiff company (1st plaintiff) and its manager (2nd plaintiff) and the sole directors and shareholders (3rd plaintiffs) sued the defendant in respect of the publication of the words "refer to drawer" on five consecutively dated cheques which were dishonoured by the defendant bank. It is to be noted that the court arrived at its finding after it has reviewed cases which included *Flach (supra)*, *Plunkett (supra)*, *Jayson (supra)*, *Pyke (supra)* and *Baker (supra)*.

[12] Learned counsel for the defendant submitted *Thong Ko Sine (supra)* followed *Jayson*'s case *(supra)* but *Flach (supra)* and *Plunkett (supra)* were not referred to and it is a case of the payee suing the drawer of the cheque and the decision on the meaning of "Refer to drawer" is mere obiter.

12.1 On an appeal by the defendant against a summary judgment entered against him by the plaintiff on a dishonoured cheque, the Court of Appeal at p. 57 held "Refer to drawer" is an euphemism meaning that there are insufficient funds in the drawer's account and that the cheque is being rejected for that reason and *Jayson*'s case *(supra)* was applied, *albeit* I agree that the meaning is obiter.

[13] In *Yeo Hiap Seng (supra)* learned counsel for the defendant submitted the learned judge followed *Flach (supra)* and *Plunkett (supra)*. Whilst not denying that this is correct as seen at p. 149 H-I left, I agree with the plaintiffs' submission that the case concerned a claim for breach of contract for sale of goods (beverages) and is not a libel action and is therefore not relevant to this circumstances of the present case.

[14] Learned counsel for the defendant submitted in *Tan Ah Sam (supra)* that the learned High Court Judge held at p. 30 D-E right "In the present case, there was no agreement, express or implied, that plaintiff was permitted to draw before the cheque is cleared. When the plaintiff issued the cheques, there was clearly no sufficient and available funds to meet them. As regards the allegation that the words "Refer to drawer" published by the

defendants were libellious, Mr. Lee cited the case of *Flach v. London and South Western Bank (Limited)* – and also referred to *Paget's Law of Banking* p. 293. On the evidence before me, I am unable to find that these words alone were libellous. The defendants were, I think, justified when compelled to dishonour the cheques, to return them with a note to the drawee that he should refer to the drawer".

14.1 Learned counsel for the defendant further submitted at p. 31 the High Court decision was affirmed by the Federal Court.

14.2 With reference to *Lee Wah Bank (supra)* learned counsel for the defendant submitted the Federal Court at p. 21 "It is settled law that if the dishonour was without reason, the customer had been libelled and was entitled to damages. The question before the court then was whether the relevant dishonour was in excess of the agreed limit of the overdraft". In this regard learned counsel contended there is no in depth discussion of the law and the above said quotation seems to be the test for deciding whether there is justification for the bank to dishonour the cheques.

14.3 In *Tan Ah Sam(supra)* the brief facts as submitted on plaintiffs' behalf were the plaintiff a fruit supply contractor opened a current account with the defendant bank. He paid in a cheque RM1,306.71 drawn on the partnership firm of which he was a partner. The cheque was returned by the bank to the plaintiff. The plaintiff had issued several cheques which were dishonoured as there was no sufficient and available funds to meet them. These cheques were returned to the drawer with the note 'refer to drawer'.

14.3.1 Apart from what has been said by the learned High Court Judge as alluded to in para. 14 above, the learned judge also on the same page (p. 30) D said "(3) in this case there was no agreement express or implied that the plaintiff was permitted to draw before the cheque was cleared and when the plaintiff issued the cheques, there was clearly no sufficient and available funds to meet them and the defendants were justified in dishonouring them; (4) on the evidence, the words "refer to drawer" by themselves

were not libellous. The defendants were justified when compelled to dishonour the cheques to return them with a note to the drawee that he should refer to the drawer.

14.3.2 Thus when viewed as a whole, it is clear the words "Refer to drawer" on a dishonoured cheque when made without good reason or cause, is capable of being defamatory.

14.4 In *Lee Wah Bank (supra)* the brief facts as submitted on plaintiffs' behalf were the respondents had applied for an overdraft of $80,000 credit permitting drawings against 60 days' sight not exceeding $20,000 making total facilities of $100,000. Subsequently two charges and a bill of sale were executed by the respondents for securing repayment of the sum of $100,000. The respondents utilised the overdraft accounts but their operation was unsatisfactory. The bank started to dishonour the cheques of the respondents after the overdraft stood in excess of $80,000. With due respect to the learned counsel for the defendant, as submitted on the plaintiffs' behalf, I agree that this case illustrates the settled principle of law that the expression "Refer to drawer" on a cheque when made without good reason or cause, is capable of being defamatory. Thus what was said by the learned counsel for the defendant is not true.

[15] As for *Sekitar Engineering Sdn Bhd (supra)*, learned counsel for the defendant submitted is a case in which the payee sued the drawer and the learned judge followed *Plunkett (supra)*. As submitted on plaintiffs' behalf with which I agree the case is irrelevant as it involved a claim for breach of building contract and did not concern a libel action on a dishonoured cheque against a bank.

[16] It was submitted on behalf of the defendant that in a case of dishonour of cheques, there are two separate and distinct causes of action available to the drawer ie.

(a) breach of contract if the bank wrongfully dishonours the cheques;

(b) libel if the words used by the bank in rejecting the cheque are defamatory.

16.1 It was further submitted the determination of the issue whether there is a breach of contract should not influence the determination of the issue whether the words used are defamatory, ie, liability for libel is not dependant at all on the outcome of the determination of whether there is breach of contract. Once the words are held defamatory, the bank may then prove justification as a defence for eg, there was insufficient fund in the account.

16.2 There is no dispute that the plaintiff's cause of action is the tort of libel. However I find learned counsel for the defendant's contention that *Lee Wah Bank (supra)* can be distinguished in that "Whether those words are libellous does not depend on whether the bank has good ground to dishonour the cheque." is flawed because it goes against the very grain of what the Federal Court has categorically stated at p. 21A "It is settled law that **if the dishonour was without reason,** the customer had been libelled and was entitled to damages." (emphasis added).

16.3 Learned counsel for the defendant also submitted the banker may give many reasons for dishonour of cheques for eg, insufficient fund and countermand as can be seen in the case of *Chan Hong-Ling (supra)*; alteration, incomplete cheque, cloned cheque, irregular endorsement. Or other examples of cases like *Frost (supra)* with the reason "reason assigned – not stated" or as in *Baker (supra)* "present again" or as in *London Joint Stock Bank Ltd v. Macmillan and Arthur* [1918-19] All ER Rep 30 at p. 53H to mean "the cheque may have been tampered with". Learned counsel then submitted that '"Refer to drawer" simply means "I am not giving the reason, please ask the drawer of the cheque". They do not mean insufficient fund."

16.4 As submitted by the learned counsel for the plaintiffs, which I agree the case of *Chan Hong-Ling (supra)* involved a criminal prosecution and for obtaining property by deception and is not a libel action against a bank and is thus not relevant to the facts and issues of this present case. Similarly, all the other cases of *Frost (supra)* and *Baker (supra)* and *Davidson v. Barclays Bank Limited* [1941] 164 LT 25 where the words used was "not sufficient" and is

therefore not relevant. The case of *London Joint Stock Bank Ltd (supra)* is of no assistance as I agree with the learned counsel for the plaintiffs the case concerned Lord Shaw's hypothetical example of a cheque being suspected of having been tampered with by the drawer and returned unpaid with the words "Refer to drawer" and did not involve any discussion on the interpretation of the said phrase in the context of a libel action for wrongful dishonour of the cheque.

[17] Learned counsel for the defendant argued in the case of *Charles Edward Victor (supra)* stating the learned High Court Judge did not refer to any authorities except statements from *Paget's Law of Banking* whilst the learned author did not cite any authorities to support the statement: "Today, it is generally accepted that the term is capable of a defamatory meaning"; there was no detailed discussion on the authorities.

[18] In *Charles Edward Victor (supra)*, the plaintiff, who was a trader and operated a current account with the defendant bank sued it for breach of contract and defamation. On two occasions two different cheques issued by the plaintiff were returned with the remark "Refer to drawer" and were wrongly dishonoured by the defendant leading to the plaintiff being blacklisted in the records of Bank Negara Malaysia and barred from operating a current account with any bank in Malaysia and the plaintiff's current account with another bank was also closed due to this blacklisting. The defendant through its solicitor's letter admitted its mistake.

18.1 I find the contention of the learned counsel for the defendant to be flawed (see para. 17 above). This is because I agree with the learned counsel for the plaintiffs at para. 13, 14, 15 and 16 appearing at pp.63 and 64 of the judgment, the learned trial judge gave his reasoning as to why he concluded the expression to be defamatory. As for *Paget's Law of Banking* 12th edn. at pp. 337-338 *(supra)* relied on by the learned judge, I also agree with the learned counsel for the plaintiffs' submission that it contains an examination of the relevant authorities before the learned editor Mark Hapgood QC draws his conclusion that the said phrase is

generally capable of a defamatory meaning; in fact the learned author stated the 12th edition was produced to give a clear and accurate statement of the law of banking as is stated as at 1 June 2002.

[19] In *Top-A Plastics Sdn Bhd (supra*) the plaintiff, a trading company had maintained several accounts with the appellant bank, which accounts were frozen by the defendant pursuant to two garnishee orders served on the defendant. As a result, cheques that were issued by the plaintiff to several parties were rejected with the words "frozen account" (12 cheques) and "refer to drawer" (2 cheques) printed on them. The plaintiff commenced proceedings against the defendant for breach of contract and for tort of libel on account of the words "frozen account" and "refer to drawer" being defamatory. His Lordship Ramly Ali J (now JCA) held at para. 35 at p. 632 that "during the frozen period from 15 October 1999 to 22 October 1999, 12 cheques had been dishonoured by the defendant and printed with the word 'FROZEN ACCOUNT' and two cheques had been printed with the words 'REFER TO DRAWER'. Contrary to the submission made by the defendant, the words 'FROZEN ACCOUNT' is highly defamatory, in its original meaning. It only suggests that the plaintiff must have been wound up or liquidated. It is more severe than the words 'account closed'. The defendant had published these defamatory words to the holder of the cheques, the banks which were clearing the cheques … It is a question of law for the court to decide whether the natural and ordinary meanings of the words used in the articles are capable of conveying a defamatory meaning of and concerning the plaintiff. Libel does not depend on the intention of the defamer but on the fact of defamation and it is irrelevant to consider the meaning for the writer and publisher intended to convey. The question is to be determined by an objective test (see *Tan Sri Dato' Vincent Tan Chee Yioun v. Haji Hasan bin Hamzah & 6 Ors* [1995] 1 CLJ 117 and *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499). In the present case, it has been shown that the defendant had wrongly frozen the plaintiff's accounts. All the cheques presented for payment were dishonoured and stamped with the words 'FROZEN ACCOUNT' and 'REFER TO DRAWER'. These words (particularly the words 'FROZEN ACCOUNT') are highly defamatory, as it suggests that the plaintiff must have been

wound-up or liquidated. The law presumes that defamatory words are false with the burden of establishing the truth of the statement falling squarely on the defendant".

19.1 Although the Court of Appeal in *Top-A Plastics Sdn Bhd (supra)* disturbed the finding on the issue on the quantum of damages made by the High Court, it affirmed the decision of the High Court in respect of its finding on liability (see paras 67 and 68 at pp. 248 and 249 of the report). Before arriving at its conclusion Heliliah Mohd Yusof JCA (now FCJ) speaking for the Court of Appeal at para. 16 at p. 234 stated "The learned trial judge had ruled that the plaintiff's cheques were dishonoured for a period of seven days although this was disputed by the defendant. Apparently 14 cheques were dishonoured. In this context the issue is whether the words "frozen account" are capable of defamatory imputation. The wrongful dishonour of a cheque amounts to a breach of contract by a bank against its customer since it will as a natural consequence affect the drawer's credit. The question here is what imputation is conveyed by the words "frozen account". There is an absence of direct judicial guidance on this point." Then Her Ladyship examined the cases of *Flach (supra), Baker (supra), Gatley on "Libel and Slander"* 10th edn., *Davidson (supra), Hill (supra)* and at para. 22 at p. 235 said "we could not differ from him on this finding for there was here an imputation as to credit arising from the ordinary meaning of the words. While those words may not necessarily impute actual insolvency the words impute stoppage of payments which would tend to injure his credit in a financial sense since the plaintiff was found to be engaged in business transactions".

19.2 Thus I find that the contention of the learned counsel for the defendant that the aforesaid statement as underlined above (para. 19.1) is not satisfactory is wholly untenable.

[20] To conclude in the light of the foregoing discussion of the Court of Appeal decision of *Top-A Plastics Sdn Bhd (supra)* and of the various authorities from foreign jurisdictions and the other Malaysian cases which favour the proposition that the expression "Refer to drawer" is capable of carrying a defamatory meaning

and bearing in mind that the plaintiffs' account had sufficient funds to meet payment on the two cheques issued, I am of the view that the issues for determination as alluded to in para. 1.1 above ought to be answered in the affirmative in favour of the plaintiffs and consequentially the plaintiffs' claim be allowed with costs as per the statement of claim and for damages to be assessed by the learned deputy registrar.